

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

US EPA RECORDS CENTER REGION 5



IN THE MATTER OF:

Old American Zinc (OAZ) Site

American Zinc, Lead and Smelting
Company;

American Zinc Company of Illinois;

Blue Tee Corporation

RESPONDENTS,

General Services Administration,

FEDERAL RESPONDENT.

Proceeding Under Sections 104, ~~105~~
122(a), 122(d)(3), and 122(h)
of the Comprehensive Environmental
Response, Compensation, and Liability
Act as amended (42 U.S.C. Sections 9604,
~~9607~~, 9622(a), 9622(d)(3), 9622(h)).

U.S. EPA Docket No.

ADMINISTRATIVE ORDER ON CONSENT
FOR REMEDIAL INVESTIGATION AND FEASIBILITY STUDY

I. INTRODUCTION

1. This Administrative Order on Consent (Consent Order) is entered into voluntarily by the United States Environmental Protection Agency (EPA), and Blue Tee Corp., as successor to American Zinc, Lead and Smelting Company and American Zinc Company of Illinois, that are collectively called the "Respondents;" and the General Services Administration (GSA), a federal agency, called the "Federal Respondent." The Consent Order concerns the preparation of, performance of, and reimbursement for all costs incurred by EPA in connection with a remedial investigation and a feasibility study (RI and FS or RI/FS) for the Old American Zinc (OAZ) Superfund Site in Fairmont City, Illinois (the Site), which is generally depicted in Attachment A, as well as reimbursement of past response costs

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

(with the exception of Respondents as to past response costs incurred through the execution of the Removal Action Administrative Order on Consent). In addition, this Consent Order resolves Respondents' claims against Federal Respondent relating to the following matters regarding the Site: (a) Respondents' response costs for response actions undertaken by Respondents regarding the Site pursuant to a Section 106 Administrative Order on Consent dated March 22, 2002 (Removal AOC); (b) Respondents' response costs regarding the RI/FS to be performed by Respondents at the Site pursuant to this Consent Order; and (c) Federal Respondent's liability for EPA's future oversight costs for the RI/FS.

II. JURISDICTION

2. This Consent Order is issued under the authority vested in the President of the United States by Sections 104, 122(a), 122(d)(3) and 122(h) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. Sections 9604, 9622(a), 9622(d)(3) and 9622(h) (CERCLA). This authority was delegated to the Administrator of EPA on January 23, 1987, by Executive Order 12580, 52 Fed. Reg. 2926 (1987), and further delegated to Regional Administrators as of January 16, 2002, by U.S. EPA Delegation Nos. 14-1 and 14-2, and to the Director, Superfund Division, Region 5, by Regional Delegation Nos. 14-1 and 14-2.

3. The Respondents and Federal Respondent agree to undertake all actions required by the terms and conditions of this Consent Order. In any action by EPA or the United States to enforce the terms of this Consent Order, Respondents and Federal Respondent consent to and agree not to contest the authority or jurisdiction of the Regional Administrator or the Superfund Division Director to issue or enforce this Consent Order, and agree not to contest the validity of this Order or its terms.

4. The Respondents' and Federal Respondent's participation in this Consent Order shall not constitute an admission of liability or agreement with EPA's findings or determinations contained in this Consent Order, except in a proceeding to enforce the terms of this Consent Order.

III. PARTIES BOUND

5. This Consent Order shall apply to and be binding upon EPA and shall be binding upon the Respondents and Federal

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

Respondent, their agents, successors, assigns, officers, directors and principals. The Respondents are jointly and severally responsible for carrying out all actions required of them by this Consent Order. The Federal Respondent is responsible for carrying out all actions required of it by this Consent Order. Compliance or non-compliance by one or more Respondents with any provision of this Consent Order shall not excuse or justify non-compliance by any other Respondent. The signatories to this Consent Order certify that they are authorized to execute and legally bind the parties they represent to this Consent Order. No change in the ownership or corporate status of the Respondents or of the facility or Site shall alter Respondents' responsibilities under this Consent Order.

6. The Respondents shall provide a copy of this Consent Order to any subsequent owners or successors before ownership rights or stock or assets in a corporate acquisition are transferred. Respondents shall provide a copy of this Consent Order to all contractors, subcontractors, laboratories, and consultants which are retained to conduct any work performed under this Consent Order, within 14 days after the effective date of this Consent Order or the date of retaining their services, whichever is later. Respondents shall condition any such contracts upon satisfactory compliance with this Consent Order. Notwithstanding the terms of any contract, Respondents are responsible for compliance with this Consent Order and for ensuring that their subsidiaries, employees, contractors, consultants, subcontractors, agents and attorneys comply with this Consent Order.

IV. STATEMENT OF PURPOSE

7. In entering into this Consent Order, the objectives of EPA, the Respondents and the Federal Respondent are: (a) to determine the nature and extent of any contamination and any threat to the public health, welfare, or the environment caused by the release or threatened release of hazardous substances, pollutants or contaminants at or from the Site or facility, by conducting a remedial investigation; (b) to determine and evaluate alternatives for remedial action (if any) to prevent, mitigate or otherwise respond to or remedy any release or threatened release of hazardous substances, pollutants, or contaminants at or from the Site or facility, by conducting a feasibility study; and (c) to recover response and oversight costs incurred by EPA and to resolve Respondents' claim against

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

the Federal Respondent to recover response costs incurred by the Respondents with respect to the Site.

8. The activities conducted under this Consent Order are subject to approval by EPA and shall provide all appropriate necessary information for the RI and FS Reports, the baseline risk assessment, and for a Record of Decision (ROD) that is consistent with CERCLA and the National Contingency Plan (NCP), 40 C.F.R. Part 300. The activities conducted under this Consent Order shall be conducted in compliance with all applicable EPA guidance, policies, and procedures.

V. EPA'S FINDINGS OF FACT

Based on available information, including the Administrative Record in this matter, EPA hereby finds, and, for purposes of enforceability of this Order only, the Respondents and Federal Respondent stipulate that the factual statutory prerequisites under CERCLA necessary for issuance of this Consent Order have been met. EPA's findings and this stipulation include the following:

9. The Site is located in Fairmont City, Illinois and consists of approximately 132 acres of industrial property, including any affected creeks and wetlands; and, potentially, an unknown number of other residential, industrial, commercial and school properties, that surround the former OAZ smelter property.

10. The Site is generally depicted in a map attached as Attachment A.

11. Granby Mining and Smelting Company built a primary zinc smelter on the Site in 1912 and operated the facility until 1916. American Zinc Company of Illinois, a subsidiary of American Zinc, Lead and Smelting Company, purchased the smelter in 1916 and continued smelting operations at the facility until 1967.

12. In 1941, the Defense Plant Corporation (DPC), a federally established entity, leased property from American Zinc at Fairmont City, Illinois. DPC contracted with American Zinc to have facilities, equipment and machinery added to the leased property. DPC then leased the same property back to American Zinc. In 1941, another federally created entity, the Metals Reserve Company (MRC), contracted with American Zinc in order to supply and store zinc concentrates on American Zinc property.

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

In 1943, MRC contracted to buy metallic zinc residues from American Zinc. In 1950, American Zinc purchased the additions to the Fairmont City, Illinois property. The federal entity known as the "General Services Administration" is the current successor to DPC and MRC.

13. In 1967, American Zinc discontinued operations at the Site and dismantled the facility. In 1976, XTRA Intermodal, Inc. ("XTRA") leased, and in 1979 purchased, the Site property from Azcon Corporation, a successor to American Zinc (and predecessor of Blue Tee Corp.)

14. XTRA Intermodal, Inc. used the property to store truck semi-trailers. During its ownership, XTRA Intermodal spread some of the remaining zinc slag piles over various sections of the Site to provide a level surface for semi-trailer truck movement and storage.

15. Laboratory analysis of soil and waste samples taken from the industrial property of the Site showed high levels of antimony, arsenic, cadmium, copper, lead, mercury, nickel, selenium, silver and zinc. Residential soil samples taken near the Site showed high levels of arsenic, cadmium, copper, lead, magnesium, and zinc. Sediment samples taken from nearby creeks and wetlands showed high levels of arsenic, cadmium, chromium, copper, lead, manganese, mercury, nickel, selenium, and zinc.

16. On February 14, 1996 the Illinois Department of Public Health prepared a Health Consultation Report on this Site. The report concluded that:

a. The OAZ Site in Fairmont City, Illinois poses a public threat based on chronic exposure of children to arsenic, cadmium, and lead in residential soils surrounding the OAZ industrial property.

b. Nearby residents are exposed to contaminated airborne particles which originate on-Site. This exposure would be the highest during dry windy periods or when Site activity is high. The extent of this exposure and resulting health effects (if any) cannot be determined without sufficient air monitoring data.

c. Worker exposure to on-Site contaminants certainly occurs. The highest exposures would likely occur during activities which disturb the waste material.

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

17. On November 2, 1999 EPA conducted a follow-up Site assessment at this Site, including surrounding residential areas. An analysis of samples taken during this Site assessment revealed high lead levels in samples taken from the former OAZ property and samples taken from adjacent residential properties. The lead concentrations in the samples taken exceed the EPA removal action levels of 400 mg/kg for lead in residential soils and 1000 mg/kg for lead in industrial soils.

18. On March 22, 2002, EPA entered into a CERCLA Section 106 Administrative Order by Consent (AOC) with Blue Tee Corp., as successor to American Zinc, Lead and Smelting Company and American Zinc of Illinois. The AOC required the performance of sampling and, as necessary, removal actions at the residential and other at-risk properties adjacent to the Site, and prevention of recontamination of these adjacent properties. In return for performing this clean up, Blue Tee Corp. ~~will~~ received a covenant not to sue from EPA for all removal activities at the adjacent properties to the Site, contribution protection for the value of the clean up performed and a waiver of EPA past costs incurred through the execution of the AOC.

VI. EPA'S CONCLUSIONS OF LAW AND DETERMINATIONS

19. The OAZ Site, as described above, is a "facility" as defined in Section 101(9) of CERCLA, 42 U.S.C. Section 9601(9).

20. Lead, arsenic, cadmium, mercury and zinc wastes and constituents thereof at the Site, sent to the Site, disposed of at the Site, and/or transported to the Site identified in paragraphs 11 and 13 through 17 are "hazardous substances" as defined in Section 101(14) of CERCLA, 42 U.S.C. Section 9601(14), or constitute "any pollutant or contaminant" that may present an imminent and substantial danger to public health or welfare under Section 104(a)(1) of CERCLA.

21. The presence of hazardous substances at the Site or the past, present or potential migration of hazardous substances currently located at or emanating from the Site, constitute actual and/or threatened "releases" as defined in Section 101(22) of CERCLA, 42 U.S.C. Section 9601(22).

22. Respondents and Federal Respondent are each a "person" as defined in Section 101(21) of CERCLA, 42 U.S.C. Section 9601(21).

23. Respondents and Federal Respondent are responsible

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

parties under Sections 104, 107 and 122 of CERCLA, 42 U.S.C. Sections 9604, 9607 and 9622.

24. The actions required by this Consent Order are necessary to protect the public health or welfare or the environment, or are in the public interest, 42 U.S.C. Section 9622(a), are consistent with CERCLA and the NCP, 42 U.S.C. Sections 9604(a)(1), 9622(a), will expedite effective remedial action and minimize litigation, 42 U.S.C. Section 9622(a), and will secure recovery of response costs, 42 U.S.C. Sections 9607, 9622(h).

VII. NOTICE

25. By providing a copy of this Consent Order to the state, EPA is notifying the state of Illinois that this Order is being issued and that EPA is the lead agency for coordinating, overseeing, and enforcing the response action required by the Order.

VIII. WORK TO BE PERFORMED

26. All work performed under this Consent Order shall be under the direction and supervision of qualified personnel. Within 15 days of the effective date of this Consent Order, Respondents shall notify EPA in writing of its Project Coordinator and his qualifications. Within 15 days of the date that the work outlined below begins, the Respondents shall notify EPA in writing of the names, titles, and qualifications of the personnel, including contractors, subcontractors, consultants and laboratories to be used in carrying out such work. With respect to any proposed contractor, the Respondents shall demonstrate that the proposed contractor has a quality system which complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995), by submitting a copy of the proposed contractor's Quality Management Plan (QMP). The QMP should be prepared in accordance with "EPA Requirements for Quality Management Plans (QA/R-2)," (EPA/240/B-01/002, March 2001) or equivalent documentation as determined by EPA. The qualifications of the persons undertaking the work for Respondents shall be subject to EPA's review, for verification that such persons meet minimum technical background and experience requirements. This Consent Order is contingent on Respondents' demonstration to EPA's satisfaction that

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

Respondents are qualified to perform properly and promptly the actions set forth in this Consent Order. If EPA disapproves in writing of any person's technical qualifications, Respondents shall notify EPA of the identity and qualifications of the replacement within 15 days of the written notice. If EPA subsequently disapproves of the replacement, EPA reserves the right to terminate this Consent Order and to conduct a complete RI and FS, and to seek reimbursement for costs and penalties from Respondents. During the course of the RI and FS, Respondents shall notify EPA in writing of any changes or additions in the personnel used to carry out such work, providing their names, titles, and qualifications. EPA shall have the same right to approve changes and additions to personnel as it has hereunder regarding the initial notification.

27. Respondents shall conduct activities and submit deliverables as provided by the attached RI and FS Statement of Work (SOW), which is incorporated by reference, for the development of the RI and FS. All such work shall be conducted in accordance with CERCLA, the NCP, and EPA guidance including, but not limited to, the "Interim Final Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA" (OSWER Directive # 9355.3-01), "Guidance for Data Usability in Risk Assessment" (OSWER Directive #9285.7-05) and guidance referenced therein, and guidance referenced in the SOW, as may be amended or modified by EPA. The general activities that Respondents are required to perform are identified below, followed by a list of deliverables. The tasks that Respondents must perform are described more fully in the SOW and guidance. The activities and deliverables identified below shall be developed as provisions in the Support Sampling Plan, and shall be submitted to EPA as provided. All work performed under this Consent Order shall be in accordance with the schedules herein, and in full accordance with the standards, specifications, and other requirements of the Support Sampling Plan, as initially approved or modified by EPA, and as may be amended or modified by EPA from time to time. For the purpose of this Consent Order, day means calendar day unless otherwise noted in the Consent Order.

A. Task I. RI/FS Support Sampling Plan.

1. Within 120 days of the effective date of this Consent Order, Respondents shall submit to EPA a complete draft RI/FS Support Sampling Plan (SSP). If EPA disapproves of or requires

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

revisions to the RI/FS SSP, in whole or in part, Respondents shall amend and submit to EPA a revised RI/FS SSP which incorporates all EPA comments, within 45 days of receiving EPA's comments.

a. Quality Assurance Project Plan (QAPP) and Field Sampling Plan (FSP). As part of the SSP, Respondents shall submit to EPA a QAPP and FSP, as described in the SOW and guidances.

b. Site Health and Safety Plan. As part of the SSP, Respondents shall submit to EPA a Site Health and Safety Plan.

Following approval or modification by EPA, the RI/FS SSP is incorporated by reference herein.

B. Task II. Community Involvement Support and Technical Assistance Plan. When requested by EPA, Respondents also shall provide EPA with the following deliverable:

1. Technical Assistance Plan: Within 30 days of a request by EPA, Respondents shall provide EPA with a Technical Assistance Plan (TAP) for providing and administering \$50,000 of Respondents' funds to be used by selected representatives of the community to hire independent technical advisors during the Work conducted pursuant to this Consent Order. The TAP shall state that Respondents will provide and administer any additional amounts needed if the selected community group demonstrates such a need prior to EPA's issuance of the Record of Decision. If EPA disapproves of or requires revisions to the TAP, in whole or in part, Respondents shall amend and submit to EPA a revised TAP that is responsive to EPA's comments, within 30 days of receiving EPA's comments.

C. Task III. Remedial Investigation. Following EPA approval or modification of the SSP, Respondents shall implement the provisions of the plan to characterize the Site. Respondents shall provide EPA with analytical data within 75 days of receipt of analytical data collected from each sampling activity, in an electronic format (i.e., computer disk) showing the location, medium and results. Within 7 days of completion of field activities, Respondents shall notify EPA in writing.

D. Task IV: Remedial Investigation (RI) Report. Within 150

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

days following receipt of analytical data from completion of the investigation activities set forth in the SOW and RI/FS SSP, Respondents shall submit a draft RI Report consistent with the SOW and RI/FS SSP. The major components of the RI Report include contaminant identification, exposure assessment, toxicity assessment, and human health and ecological risk characterization. If EPA disapproves of or requires revisions to the RI Report, in whole or in part, Respondents shall amend and submit to EPA a revised RI Report which incorporates all of EPA's required revisions, within 45 days of receiving EPA's comments.

E. Task V: Alternatives Array Document (AAD). An Alternatives Array Document (AAD) shall be prepared, as referenced in and according to the requirements of the SOW, and shall be integrated with the site characterization activities of the final RI Report. Within 45 days of EPA approval of the final RI Report, the AAD shall be submitted to EPA. If necessary, within 45 days of Respondents' receipt of EPA comments on the draft AAD, Respondents shall submit a final AAD.

F. Task VI: Feasibility Study (FS) Report. Within 60 days of EPA approval of the AAD, Respondents shall submit a draft FS Report to EPA for approval. A final FS Report shall be submitted to EPA and Illinois EPA within 45 days of Respondents' receipt of EPA's comments on the draft FS Report.

28. EPA reserves the right to comment on, modify and direct changes to all deliverables. At EPA's discretion, Respondents must fully correct all deficiencies and incorporate and integrate all information and comments supplied by EPA either in subsequent or resubmitted deliverables.

29. Respondents shall not proceed further with any subsequent activities or tasks until receiving EPA approval for the following deliverables: RI/FS SSP and RI Report. While awaiting EPA approval on these deliverables, Respondents shall proceed with all other tasks and activities which may be conducted independently of these deliverables, in accordance with the schedule set forth in the SOW or other relevant portions of this Consent Order.

30. For all remaining deliverables not enumerated above in paragraph 29, Respondents shall proceed with all subsequent tasks, activities and deliverables without awaiting EPA approval on the submitted deliverable. EPA reserves the right to stop

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

Respondents from proceeding further, either temporarily or permanently, on any task, activity or deliverable at any point during the RI/FS.

31. In the event that Respondents amend or revise a report, plan or other submittal upon receipt of EPA comments, if EPA subsequently disapproves of the revised submittal, or if subsequent submittals do not fully reflect EPA's directions for changes, EPA retains the right to seek stipulated or statutory penalties; perform its own studies, complete the RI/FS (or any portion of the RI/FS) under CERCLA and the NCP, and seek reimbursement from all Respondents for EPA costs; and/or seek any other appropriate relief.

32. In the event that EPA takes over some of the tasks, but not the preparation of the RI and FS Reports, Respondents shall incorporate and integrate information supplied by EPA into the final RI and FS Reports.

33. Neither failure of EPA to expressly approve or disapprove of Respondents' submissions within a specified time period(s), nor the absence of comments, shall be construed as approval by EPA.

34. Respondents shall, prior to any off-Site shipment of hazardous substances from the Site to an out-of-state waste management facility, provide written notification to the appropriate state environmental official in the receiving state and to EPA's Designated Project Coordinator of such shipment of hazardous substances. However, the notification of shipments shall not apply to any such off-Site shipments when the total volume of such shipments will not exceed 10 cubic yards.

(a) The notification shall be in writing, and shall include the following information, where available: (1) the name and location of the facility to which the hazardous substances are to be shipped; (2) the type and quantity of the hazardous substances to be shipped; (3) the expected schedule for the shipment of the hazardous substances; and (4) the method of transportation. Respondents shall notify the receiving state of major changes in the shipment plan, such as a decision to ship the hazardous substances to another facility within the same state, or to a facility in another state.

(b) The identity of the receiving facility and state will be determined by Respondents following the award of the contract

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

for the remedial investigation and feasibility study. Respondents shall provide all relevant information, including information under the categories noted in paragraph 34(a) above, on the off-Site shipments, as soon as practical after the award of the contract and before the hazardous substances are actually shipped.

IX. MODIFICATION OF THE SUPPORT SAMPLING PLAN

35. If at any time during the RI/FS process, Respondents identify a need for additional data, a memorandum documenting the need for additional data shall be submitted to the EPA Project Coordinator within 20 days of identification. EPA in its discretion will determine whether the additional data will be collected by Respondents and whether it will be incorporated into reports and deliverables.

36. In the event of conditions posing an immediate threat to human health or welfare or the environment, Respondents shall notify EPA immediately. In the event of unanticipated or changed circumstances at the Site, Respondents shall notify the EPA Project Coordinator by telephone within 24 hours of discovery of the unanticipated or changed circumstances. In addition to the authorities in the NCP, in the event that EPA determines that the immediate threat or the unanticipated or changed circumstances warrant changes in the RI/FS SSP, EPA shall modify or amend the RI/FS SSP in writing accordingly. Respondents shall perform the RI/FS SSP as modified or amended.

37. EPA may determine that in addition to tasks defined in the initially approved RI/FS SSP, other additional work may be necessary to accomplish the objectives of the RI/FS as set forth in the SOW for this RI/FS. EPA may require that the Respondents perform these response actions in addition to those required by the initially approved RI/FS SSP, including any approved modifications, if it determines that such actions are necessary for a complete RI/FS. Respondents shall confirm their willingness to perform the additional work in writing to EPA within 7 days of receipt of the EPA request or Respondents shall invoke dispute resolution. Subject to EPA resolution of any dispute, Respondents shall implement the additional tasks which EPA determines are necessary. The additional work shall be completed according to the standards, specifications, and schedule set forth or approved by EPA in a written modification to the SSP or written RI/FS SSP supplement. EPA reserves the right to conduct the work itself at any point, to seek

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye reimbursement from Respondents, and/or to seek any other appropriate relief.

X. QUALITY ASSURANCE

38. Respondents shall assure that work performed, samples taken and analyses conducted conform to the requirements of the SOW, the QAPP and guidance identified therein. Respondents shall assure that field personnel used by Respondents are properly trained in the use of field equipment and in chain of custody procedures. Respondents shall only use laboratories which have a documented quality system that complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995) and "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/240/B-01/002, March 2001) or equivalent documentation as determined by EPA. EPA may consider laboratories accredited under the National Environmental Laboratory Accreditation Program (NELAP) to meet the quality system requirements.

XI. FINAL RI AND FS REPORTS AND AAD, PROPOSED PLAN, PUBLIC COMMENT, RECORD OF DECISION, ADMINISTRATIVE RECORD

39. EPA retains the responsibility for the release to the public of the RI and FS Reports and the AAD. EPA retains responsibility for the preparation and release to the public of the Proposed Plan and ROD in accordance with CERCLA and the NCP.

40. EPA will determine the contents of the administrative record file for selection of the remedial action. Respondents must submit to EPA documents developed during the course of the RI/FS upon which selection of the response action may be based. Respondents shall provide copies of plans, task memoranda for further action, quality assurance memoranda and audits, raw data, field notes, laboratory analytical reports and other reports. Respondents must additionally submit any previous studies conducted under state, local or other federal authorities relating to selection of the response action, and all communications between Respondents and state, local or other federal authorities concerning selection of the response action. At EPA's discretion, Respondents may establish a community information repository at or near the Site, to house one copy of the administrative record.

XII. PROGRESS REPORTS AND MEETINGS

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

41. Respondents shall make presentations at, and participate in, meetings at the request of EPA during the initiation, conduct, and completion of the RI/FS. In addition to discussion of the technical aspects of the RI/FS, topics will include anticipated problems or new issues. Meetings will be scheduled at EPA's discretion and in reasonable consideration of Respondents' schedules.

42. In addition to the deliverables set forth in this Consent Order and the SOW, Respondents shall provide to EPA monthly progress reports by the 10th day of the following month commencing 30 days after the effective date of the Consent Order. At a minimum, with respect to the preceding month, these progress reports shall (1) describe the actions which have been taken to comply with this Consent Order during that month, (2) include all results of sampling and tests and all other data received by the Respondents, (3) describe work planned for the next month with schedules relating such work to the overall project schedule for RI/FS completion and (4) describe all problems encountered and any anticipated problems, any actual or anticipated delays, and solutions developed and implemented to address any actual or anticipated problems or delays.

XIII. SAMPLING, ACCESS, AND DATA AVAILABILITY/ADMISSIBILITY

43. All results of sampling, tests, modeling or other data (including raw data) generated by Respondents, or on Respondents' behalf, during implementation of this Consent Order, shall be submitted to EPA in the subsequent monthly progress report as described in Section XII of this Order. EPA will make available to the Respondents validated data generated by EPA unless it is exempt from disclosure by any federal or state law or regulation.

44. Respondents will verbally notify EPA at least 15 days prior to conducting significant field events as described in the SOW or SSP. At EPA's verbal or written request, or the request of EPA's oversight assistant, Respondents shall allow split or duplicate samples to be taken by EPA (and its authorized representatives) of any samples collected by the Respondents in implementing this Consent Order. All split samples of Respondents shall be analyzed by the methods identified in the QAPP.

45. At all reasonable times, EPA and its authorized representatives shall have the authority to enter and freely

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

move about all property at the Site and off-Site areas where work, if any, is being performed, for the purposes of inspecting conditions, activities, the results of activities, records, operating logs, and contracts related to the Site or Respondents and their contractor pursuant to this Consent Order; reviewing the progress of the Respondents in carrying out the terms of this Consent Order; conducting tests as EPA or its authorized representatives deem necessary; using a camera, sound recording device or other documentary type equipment; and verifying the data submitted to EPA by the Respondents. The Respondents shall allow these persons to inspect and copy all records, files, photographs, documents, sampling and monitoring data, and other writings related to work undertaken in carrying out this Consent Order. Nothing herein shall be interpreted as limiting or affecting EPA's right of entry or inspection authority under federal law. All parties with access to the Site under this paragraph shall comply with all approved Health and Safety Plans.

46. The Respondents may assert a claim of business confidentiality covering part or all of the information submitted to EPA pursuant to the terms of this Consent Order under 40 C.F.R. Section 2.203, provided such claim is allowed by Section 104(e)(7) of CERCLA, 42 U.S.C. Section 9604(e)(7). This claim shall be asserted in the manner described by 40 C.F.R. Section 2.203(b) and substantiated at the time the claim is made. Information determined to be confidential by EPA will be given the protection specified in 40 C.F.R. Part 2. If no such claim accompanies the information when it is submitted to EPA, it may be made available to the public by EPA or the state without further notice to the Respondents. Respondents agree not to assert confidentiality claims with respect to any data related to Site conditions, sampling, or monitoring.

47. In entering into this Consent Order, Respondents waive any objections to any data gathered, generated, or evaluated by EPA, the state or Respondents in the performance or oversight of the work that has been verified according to the quality assurance/quality control (QA/QC) procedures required by the Consent Order or any EPA-approved SSPs. If Respondents object to any other data relating to the RI/FS, Respondents shall submit to EPA a report that identifies and explains their objections, describes the acceptable uses of the data, if any, and identifies any limitations to the use of the data. The report must be submitted to EPA within 15 days of the monthly progress report containing the data.

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

48. If the Site, or the off-Site area that is to be used for access or is within the scope of the RI/FS, is owned in whole or in part by parties other than those bound by this Consent Order, Respondents will obtain, or use their best efforts to obtain, Site access agreements from the present owner(s) within 90 days of the effective date of this Consent Order. Such agreements shall provide access for EPA, its contractors and oversight officials, the state and its contractors, and the Respondents or their authorized representatives, and such agreements shall specify that Respondents are not EPA's representative with respect to liability associated with Site activities. Copies of such agreements shall be provided to EPA prior to Respondents' initiation of field activities. Respondents' best efforts shall include providing reasonable compensation to any off-Site property owner. If access agreements are not obtained within the time referenced above, Respondents shall immediately notify EPA of their failure to obtain access. EPA may obtain access for the Respondents, perform those tasks or activities with EPA contractors, or modify or terminate the Consent Order in the event that Respondents cannot obtain access agreements. In the event that EPA performs those tasks or activities with EPA contractors and does not terminate the Consent Order, Respondents shall perform all other activities not requiring access to that Site, and shall reimburse EPA for all costs incurred in performing such activities. Respondents additionally shall integrate the results of any such tasks undertaken by EPA into its reports and deliverables. Furthermore, the Respondents agree to indemnify the U.S. Government as specified in Section XXVII of this Consent Order. Respondents also shall reimburse EPA for all costs and attorney fees incurred by the United States to obtain access for the Respondents pursuant to paragraph 48.

XIV. DESIGNATED PROJECT COORDINATORS

49. Documents, including reports, approvals, disapprovals, and other correspondence which must be submitted under this Consent Order, shall be sent by certified mail, return receipt requested, to the following addressees or to any other addressees which the Respondents and EPA designate in writing:

- (a) Documents to be submitted to EPA should be sent to:

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

Ron Murawski
Remedial Project Manager
United States Environmental Protection Agency
77 West Jackson Blvd.; mail code: SR-6J
Chicago, Illinois 60604-3590
Phone (312) 886-2940
FAX (312) 886-4071
E-mail "murawski.ronald@epa.gov"

With copies to:

Greg Ratliff
Project Manager
Illinois Environmental Protection Agency
Bureau of Land
Division of Land Pollution Control
1021 North Grand Avenue East
Springfield, IL 62702
Remove blank line here
Phone: (217) 782-9882
Fax: (217) 557-1165
E-mail "greg.ratliff@epa.state.il.us"

Tom Turner
Associate Regional Counsel
U.S. EPA - Region 5
77 West Jackson Boulevard, C-14J
Chicago, Illinois 60604-3590
Phone (312) 886-6613
FAX (312) 886-0747
E-mail "turner.thomas@epa.gov"

(b) Documents to be submitted to the Respondents should be sent to:

Blue Tee Corp.
c/o Terrance Gileo Faye, Esq.
Babst, Calland, Clements & Zomnir
1 North Maple Avenue
Greensburg, Pennsylvania 15601
Phone (724) 837-6221
FAX (724) 837-0971
E-mail "tgfaye@comcast.net"

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

(c) Documents to be submitted to the Federal Respondent should be sent to:

Daniel W. Pinkston, Esq.
U.S. Department of Justice, ENRD/EDS
Denver Field Office
999 18th Street - Suite 945, North
Denver, CO 80202
Phone (303) 312-7397
FAX (303) 312-7331
E-mail "daniel.pinkston@usdoj.gov"

General Services Administration
Bernard K. Schafer
Senior Assistant General Counsel
U.S. General Services Administration
1800 F Street, NW
Washington, D.C. 20405

50. On or before the effective date of this Consent Order, EPA and the Respondents shall each designate their own Project Coordinator. Each Project Coordinator shall be responsible for overseeing the implementation of this Consent Order. To the maximum extent possible, communications between the Respondents and EPA shall be directed to the Project Coordinator by mail, with copies to such other persons as EPA, the state, and Respondents may respectively designate. Communications include, but are not limited to, all documents, reports, approvals, and other correspondence submitted under this Consent Order.

51. EPA and the Respondents each have the right to change their respective Project Coordinator. The other party must be notified in writing at least 10 days prior to the change.

52. EPA's Project Coordinator shall have the authority lawfully vested in a Remedial Project Manager (RPM) and On-Scene Coordinator (OSC) by the NCP. In addition, EPA's Project Coordinator shall have the authority, consistent with the NCP, to halt any work required by this Consent Order, and to take any necessary response action when s/he determines that conditions at the Site may present an immediate endangerment to public health or welfare or the environment. The absence of the EPA Project Coordinator from the area under study pursuant to this Consent Order shall not be cause for the stoppage or delay of work.

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

53. EPA shall arrange for a qualified person to assist in its oversight and review of the conduct of the RI/FS, as required by Section 104(a) of CERCLA, 42 U.S.C. Section 9604(a). The oversight assistant may observe work and make inquiries in the absence of EPA, but is not authorized to modify the SSP.

XV. OTHER APPLICABLE LAWS

54. Respondents shall comply with all laws that are applicable when performing the RI/FS. No local, state, or federal permit shall be required for any portion of any action conducted entirely on-Site, including studies, where such action is selected and carried out in compliance with Section 121 of CERCLA, 42 U.S.C. Section 9621.

XVI. RECORD PRESERVATION

55. All records and documents in Respondents' possession that relate in any way to the Site shall be preserved during the conduct of this Consent Order and for a minimum of 10 years after commencement of construction of any remedial action. The Respondents shall acquire and retain copies of all documents that relate to the Site and are in the possession of their employees, agents, accountants, contractors, or attorneys. After this 10 year period, the Respondents shall notify EPA at least 90 days before the documents are scheduled to be destroyed. If EPA requests that the documents be saved, the Respondents shall, at no cost to EPA, give EPA the documents or copies of the documents.

EPA acknowledges that the Federal Respondent is subject to all applicable Federal record retention laws, regulations, and policies.

XVII. DISPUTE RESOLUTION

56. Any disputes between Respondents and EPA concerning activities or deliverables required under this Consent Order shall be resolved as follows: Any dispute which arises under or with respect to this Consent Order shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless it is modified by written agreement of the parties to the dispute. The dispute shall be considered to have arisen when one party sends the other a written Notice of Dispute. In the event that the parties

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

cannot resolve a dispute by informal negotiations, then the position advanced by EPA shall be considered binding unless, within 14 days after the conclusion of the informal negotiation period, Respondents invoke the formal dispute resolution procedures of this Section by serving on the EPA written notice of its objections. Respondents' written objections shall define the dispute, state the basis of Respondents' objections, and be sent certified mail, return receipt requested or by express mail. EPA shall submit its written position statement to Respondents no later than 10 days after receipt of Respondents' written objections. EPA and Respondents shall then have an additional 14 days to reach agreement unless this period is extended upon Respondents' request at the sole discretion of EPA. If an agreement is not reached within 14 days, Respondents may request a written determination by EPA's Superfund Division Director, which determination shall be consistent with the NCP and the terms of this Consent Order. EPA shall maintain an administrative record of the dispute to be reviewed and considered by the Superfund Division Director. The Superfund Division Director's determination is EPA's final decision. Respondents shall proceed in accordance with EPA's final decision regarding the matter in dispute (with full reservation of rights), regardless of whether Respondents agree with the decision. If Respondents do not agree to perform or do not actually perform the work in accordance with EPA's final decision, EPA reserves the right in its sole discretion to conduct the work itself, to seek reimbursement from Respondents, to seek enforcement of the decision, to seek stipulated penalties, and/or to seek any other appropriate relief.

57. Respondents are not relieved of their obligations to perform and conduct activities and submit deliverables, which are not the subject of the dispute resolution, on the schedule set forth in the RI/FS SSP, while a matter is pending in dispute resolution. Respondents shall fulfill the requirement that is the subject of the dispute in accordance with the agreement reached between the parties, or with EPA's decision, whichever occurs last. The invocation of dispute resolution does not stay stipulated penalties under this Consent Order, however, if Respondents prevail in dispute resolution, no penalties shall be due.

XVIII. DELAY IN PERFORMANCE/STIPULATED PENALTIES

58. For each day that the Respondents fail to complete a deliverable in a timely manner or otherwise fail to perform in

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

accordance with the requirements of this Consent Order, Respondents shall be liable for stipulated penalties. Penalties begin to accrue on the day after performance is due or a violation occurs, and extend through the period of correction. Where a revised submission by Respondents is required, stipulated penalties shall continue to accrue until a satisfactory deliverable is produced. EPA will provide written notice for violations that are not based on timeliness; nevertheless, penalties shall accrue from the day after a violation commences. Payment shall be due within 30 days of receipt of a demand letter from EPA.

59. Respondents shall pay interest on the unpaid balance, which shall begin to accrue at the end of the 30-day period, at the rate established by the Department of Treasury pursuant to 30 U.S.C. Section 3717.

60. Respondents shall make all payments by forwarding a check to:

U.S. Environmental Protection Agency
Superfund Accounting
P.O. Box 70753
Chicago, Illinois 60673

Checks should identify the name of the Site, the Site identification number (B5A1), the account number, and the title of this Consent Order. A copy of the check and/or transmittal letter shall be forwarded to the EPA Project Coordinator.

61. For the following major deliverables, stipulated penalties shall accrue:

<u>Deliverable/Activity</u>	<u>Penalty For</u> <u>Days 1-7</u>	<u>Penalty For</u> <u>> 7 Days</u>
Failure to Submit a Draft SSP or RI or FS Report	\$1500/Day	\$2500/Day
Failure to Submit a revised SSP or RI or FS Report	\$1500/Day	\$2500/Day

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

Failure to Submit a Data Report	\$500/Day	\$1,000/Day
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Late Submittal of Progress Reports or Other Miscellaneous Reports/Submittals	\$250/Day	\$ 500/Day
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Failure to Meet any Scheduled Deadline	\$250/Day	\$ 500/Day
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62. Respondents may dispute EPA's right to the stated amount of penalties by invoking the dispute resolution procedures under Section XVII herein. Penalties shall accrue but need not be paid during the dispute resolution period. If Respondents do not prevail upon resolution, all penalties shall be due to EPA within 30 days of resolution of the dispute. If Respondents prevail upon resolution, no penalties shall be paid.

63. In the event that EPA provides for corrections to be reflected in the next deliverable and does not require resubmission of that deliverable, stipulated penalties for that interim deliverable shall cease to accrue on the date of such decision by EPA.

64. The stipulated penalties provisions do not preclude EPA from waiving its right to stipulated penalties, or from pursuing any other remedies or sanctions which are available to EPA because of the Respondent's failure to comply with this Consent Order, including but not limited to conduct of all or part of the RI/FS by EPA provided, however, that in no event shall Respondents be subject to a total penalty, including stipulated penalties, which exceeds the maximum statutory penalty for that violation. Payment of stipulated penalties does not alter Respondents' obligation to complete performance under this Consent Order.

XIX. FORCE MAJEURE

65. "Force majeure", for purposes of this Consent Order, is defined as any event arising from causes entirely beyond the control of the Respondents and of any entity controlled by Respondents, including their contractors and subcontractors, that delays the timely performance of any obligation under this

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

Consent Order notwithstanding Respondents' best efforts to avoid the delay. The requirement that the Respondents exercise "best efforts to avoid the delay" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (1) as it is occurring and (2) following the potential force majeure event, such that the delay is minimized to the greatest extent practicable. Examples of events that are not force majeure events include, but are not limited to, increased costs or expenses of any work to be performed under this Consent Order or the financial difficulty of Respondents to perform such work.

66. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Order, whether or not caused by a force majeure event, Respondents shall notify by telephone the Remedial Project Manager or, in his or her absence, the Director of the Superfund Division, EPA Region 5, within 48 hours of when the Respondents knew or should have known that the event might cause a delay. Within five business days thereafter, Respondents shall provide in writing the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to mitigate the effect of the delay; and a statement as to whether, in the opinion of Respondents, such event may cause or contribute to an endangerment to public health, welfare or the environment. Respondents shall exercise best efforts to avoid or minimize any delay and any effects of a delay. Failure to comply with the above requirements shall preclude Respondents from asserting any claim of force majeure.

67. If EPA agrees that the delay or anticipated delay is attributable to force majeure, the time for performance of the obligations under this Consent Order that are directly affected by the force majeure event shall be extended by agreement of the parties, pursuant to Section XXVIII of this Consent Order, for a period of time not to exceed the actual duration of the delay caused by the force majeure event. An extension of the time for performance of the obligation directly affected by the force majeure event shall not, of itself, extend the time for performance of any subsequent obligation.

68. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, or does not agree with Respondents on the length of the extension, the issue shall be subject to the dispute resolution procedures

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

set forth in Section XVII of this Consent Order. In any such proceeding, to qualify for a force majeure defense, Respondents shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay was or will be warranted under the circumstances, that Respondents did exercise or are exercising due diligence by using their best efforts to avoid and mitigate the effects of the delay, and that Respondents complied with the requirements of paragraph 66.

69. Should Respondents carry the burden set forth in paragraph 68, the delay at issue shall be deemed not to be a violation of the affected obligation of this Consent Order.

XX. REIMBURSEMENT OF EPA'S PAST COSTS

70. Within 45 days of the EPA's submission of an itemized cost summary, Respondents shall remit a certified or cashiers check to EPA in the specified amount, together with interest that has accrued thereon at the rate of interest specified for the Hazardous Substances Superfund under CERCLA Section 107(a), for response costs incurred by the United States at the Site. Respondents are only required to pay EPA past costs that have accrued from April 1, 2002 (the effective date of the CERCLA 106 AOC for removal at the Site) through the Effective Date of this Consent Order.

70.1 As soon as reasonably practicable after the effective date of this Consent Order, the United States, on behalf of the Federal Respondent, shall pay to the EPA Hazardous Substance Superfund \$20,290.83, in reimbursement of EPA's past response costs incurred prior to April 1, 2002 at the Site.

70.2 If the Federal Respondent's payment to the EPA Hazardous Substances Superfund required by this paragraph is not made as soon as reasonably practicable, the appropriate EPA Regional Branch Chief may raise any issues relating to payment to the appropriate DOJ Assistant Section Chief for the Environmental Defense Section. In any event, if this payment is not made within 120 days after the effective date of this Consent Order, EPA and DOJ have agreed to resolve the issue within 30 days in accordance with a letter agreement dated December 28, 1998.

70.3 In the event that the payment required by paragraph 70 is not made within 45 days of EPA's submission of an itemized

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

cost summary, interest on the unpaid balance shall be paid at the rate established pursuant to section 107(a) of CERCLA, 42 U.S.C.
← § 9607(a), commencing on the effective date of this Consent Order and accruing through the date of the payment.

70.4 The Parties to this Consent Order recognize and acknowledge that the payment obligations of the Federal Respondent under this Consent Order can only be paid from appropriated funds legally available for such purpose. Nothing in this Consent Order shall be interpreted or construed as a commitment or requirement that the Federal Respondent obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.

71. Checks should be made payable to the Hazardous Substances Superfund and should include the name of the Site, the Site identification number, the Regional Lock Box Number account number and the title of this Consent Order. Checks should be forwarded to:

U.S. Environmental Protection Agency
Superfund Accounting
P.O. Box 70753
Chicago, Illinois 60673

Alternatively, payment shall be made to U.S. EPA by Electronic Funds transfer ("EFT") in accordance with current EFT procedures to be provided to Respondents by U.S. EPA Region 5, and shall be accompanied by a statement identifying the name and address of the parties making payment, the Site name, the U.S. EPA Region and Site/Spill ID number, the account number and the U.S. EPA docket number for this action.

71.a The total amount to be paid by Respondents and Federal Respondent pursuant to paragraph 70 shall be deposited in the OAZ Special Account within the U.S. EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by U.S. EPA to the U.S. EPA Hazardous Substance Superfund.

72. A copy of the check or wire fund transfer receipt should be sent simultaneously to the EPA Project Coordinator.

XXI. REIMBURSEMENT OF EPA'S RESPONSE AND OVERSIGHT COSTS

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

73. Following the issuance of this Consent Order, EPA shall submit to the Respondents and Federal Respondent on a yearly basis an accounting of all oversight costs including EPA's itemized cost summary (ICS). Respondents or Federal Respondent may also request supporting documentation for the ICS. Oversight costs may include, but are not limited to, costs incurred by the United States in overseeing Respondents' implementation of the requirements of this Consent Order and activities performed by the government as part of the RI/FS and community relations, including any costs incurred while obtaining access. Costs shall include all direct and indirect costs, including, but not limited to, time and travel costs of EPA personnel and associated indirect costs, contractor costs, cooperative agreement costs, compliance monitoring, including the collection and analysis of split samples, inspection of RI/FS activities, Site visits, discussions regarding disputes that may arise as a result of this Consent Order, review and approval or disapproval of reports, and costs of redoing any of Respondents' tasks. The ICS shall serve as basis for payment demands.

74. Respondents shall, within 45 days of receipt of each accounting, remit a certified or cashier's check for the amount of those costs. Interest shall accrue from the date payment of a specified amount is demanded in writing provided, however, that interest shall be waived in the event full payment is made by Respondents within 45 days as specified herein. The interest rate is the rate of interest on investments for the Hazardous Substances Superfund in Section 107(a) of CERCLA.

75. Checks should be made payable to the Hazardous Substances Superfund and should include the name of the Site, the Site identification number, the account number and the title of this Consent Order. Checks should be forwarded to:

U.S. Environmental Protection Agency
Superfund Accounting
P.O. Box 70753
Chicago, Illinois 60673

Alternatively, payment may be made to U.S. EPA by Electronic Funds Transfer ("EFT") in accordance with current EFT procedures to be provided to Respondents by U.S. EPA Region 5, and shall be accompanied by a statement identifying the name and address of the parties making payment, the Site name, the U.S. EPA Region and Site/Spill ID Number, the account number, and the U.S. EPA docket number for this action.


Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

75.a The total amount to be paid by Respondents pursuant to Paragraphs 73 and 74 shall be deposited in the OAZ Special Account within the U.S. EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or transferred by U.S. EPA to the U.S. EPA Hazardous Substance Superfund.

76. Copies of the transmittal letter and check should be sent simultaneously to the EPA Project Coordinator.

77. Respondents agree to limit any disputes concerning costs to accounting errors and the inclusion of costs outside the scope of this Consent Order. Respondents may request back up cost documentation in order to determine the nature of the costs included in the yearly accounting. Respondents shall identify any contested costs and the basis of their objection. All undisputed costs shall be remitted by Respondents in accordance with the schedule set forth above. Disputed costs shall be paid by Respondents into an escrow account while the dispute is pending. Respondents bear the burden of establishing an EPA accounting error or the inclusion of costs outside the scope of this Consent Order.

XXII. RESERVATIONS OF RIGHTS AND REIMBURSEMENT OF OTHER EPA COSTS

78. EPA reserves the right to bring an action against the Respondents under Section 107 of CERCLA for recovery of all response costs including oversight costs, incurred by the United States at the Site that are not reimbursed by the Respondents, any costs incurred in the event that EPA performs the RI/FS, or any part thereof, and, any future costs incurred by the United States in connection with response activities conducted under CERCLA at this Site. 

79. Other than for past response costs incurred by EPA prior to April 1, 2002, EPA reserves the right to bring an action against Respondents to enforce the past costs and response and oversight cost reimbursement requirements of this Consent Order, to collect stipulated penalties assessed pursuant to Section XVIII of this Consent Order, and to seek penalties pursuant to Section 109 of CERCLA, 42 U.S.C. Section 9609.

4/22 or 1/22 alone
80. Except as expressly provided in this Consent Order, each party reserves all rights and defenses it may have. Nothing in this Consent Order shall affect EPA's removal authority or

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

EPA's response or enforcement authorities including, but not limited to, the right to seek injunctive relief, stipulated penalties, statutory penalties, and/or punitive damages.

81. For purposes of section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B), EPA agrees that the Respondents and Federal Respondent have resolved, pursuant to sections 122(a), (d)(3), and (h) of CERCLA, 42 U.S.C. § 9622(a), (d)(3) and (h), their liability to the United States for performance of the response actions required by this Consent order, and for past response costs, future response costs and oversight costs incurred by EPA to be reimbursed by Respondents and Federal Respondent under this Consent Order, at the Old American Zinc site. EPA also agrees that this Consent Order constitutes an administrative settlement pursuant to section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B). Respondents and Federal Respondent are not released from liability, if any, for any response actions taken beyond the scope of this Consent Order regarding removals, other operable units, remedial design/remedial action of this operable unit, or activities arising pursuant to section 121(c) of CERCLA, 42 U.S.C. § 9621(c).

XXIII. DISCLAIMER

82. By signing this Consent Order and taking actions under this Consent Order, the Respondents and Federal Respondent do not thereby admit EPA's Findings of Fact and Conclusions of Law. Furthermore, the participation of the Respondents and Federal Respondent in this Consent Order shall not be considered an admission of liability and is not admissible in evidence against the Respondents in any judicial or administrative proceeding other than a proceeding by the United States, including EPA, to enforce this Consent Order or a judgment relating to it. Respondents and Federal Respondent retain their rights to assert claims against other potentially responsible parties at the Site. However, the Respondents and Federal Respondent agree not to contest the validity or terms of this Consent Order, or the procedures underlying or relating to it in any action brought by the United States, including EPA, to enforce its terms.

XXIV. OTHER CLAIMS

83. In entering into this Consent Order, Respondents and Federal Respondent waive any right to seek reimbursement under Section 106(b) of CERCLA, 42 U.S.C. Section 9606(b). Respondents

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

and Federal Respondent also waive any right to present a claim under Sections 111 or 112 of CERCLA, 42 U.S.C. Sections 9611 or 9612. This Consent Order does not constitute any decision on preauthorization of funds under Section 111(a)(2) of CERCLA, 42 U.S.C. Sections 9611(a)(2). Respondents further waive all other statutory and common law claims against EPA, including, but not limited to, contribution and counterclaims, relating to or arising out of conduct of the RI/FS. This paragraph does not preclude demand for reimbursement from the Superfund of costs incurred by Federal Respondent in the performance of its duties (other than pursuant to this Consent Order) as lead or support agency under the NCP (40 CFR Part 300).

84. Nothing in this Consent Order shall constitute or be construed as a satisfaction of or release from any claim, cause of action or demand in law or equity against any person, firm, partnership, subsidiary, government entity or corporation not a signatory to this Consent Order for any liability it may have arising out of or relating in any way to the generation, storage, treatment, handling, transportation, release, or disposal of any hazardous substances, pollutants, or contaminants found at, taken to, or taken from the Site.

85. Respondents and Federal Respondent shall bear their own costs and attorneys' fees.

XXV. COVENANT NOT TO SUE

86. Except as otherwise specifically provided in this Consent Order, upon execution of this Consent Order ~~termination of this Consent Order pursuant to Section XXIX (Termination and Satisfaction)~~, EPA covenants not to sue Respondents for judicial imposition of costs, damages or civil penalties or to take administrative action against Respondents or Federal Respondent for any failure to perform actions agreed to in this Consent Order except as otherwise reserved herein.

87. Except as otherwise specifically provided in this Consent Order, in consideration and upon Respondents' and Federal Respondent's payment of the Past and/or Oversight Costs specified in Sections XX and XXI of this Consent Order, EPA covenants not to sue or to take administrative action against Respondents or Federal Respondent under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), for recovery of Past and Oversight Costs incurred by the United States in connection with the matters set forth in this Consent Order. These covenants shall take effect upon the

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye
receipt by EPA of the payments required by Sections XX and XXI.

88. These covenants not to sue or to take administrative action are conditioned upon the complete and satisfactory performance by Respondents and Federal Respondent of their respective obligations under this Consent Order. These covenants not to sue or to take administrative action extend only to the Respondents and Federal Respondent and do not extend to any other person.

XXVI. CONTRIBUTION PROTECTION

89. With regard to claims for contribution against Respondents and Federal Respondent for matters addressed in this Consent Order, the Parties hereto agree that the Respondents and the Federal Respondent are entitled to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. Sections 9613(f)(2) and 9622(h)(4).

"Matters addressed" in the preceding sentence means EPA's Past Costs, including EPA's past costs prior to April 1, 2002, EPA's oversight costs for this RI/FS, all response costs for the March 2002 CERCLA Section 106 Administrative Order by Consent, and all response costs incurred by EPA, the Respondents and/or Federal Respondent pursuant to this Consent Order, including but not limited to the cost of the Work.

Nothing in this Consent Order affects any rights the Respondents may have to assert claims, or causes of action, or demands against any person not a party to this Consent Order for indemnification or contribution under Section 113 of CERCLA, 42 U.S.C. Section 9613, or state law.

XXVII. INDEMNIFICATION

90. The Respondents agree to indemnify and hold the United States Government, its agencies, departments, agents, and employees harmless from any and all claims or causes of action arising from or on account of acts or omissions of Respondents, their employees, agents, servants, receivers, successors, or assignees, or any persons including, but not limited to, firms, corporations, subsidiaries and contractors, in carrying out activities under this Consent Order. The United States Government or any agency or authorized representative thereof shall not be held as a party to any contract entered into by

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

Respondents in carrying out activities under this Consent Order. Nothing in this Consent Order, however, requires indemnification by Respondents for any claim or cause of action against the United States based on negligent action taken solely and directly by EPA (not including oversight or approval of plans or activities of the Respondents).

XXVIII AGREEMENT BETWEEN RESPONDENTS AND FEDERAL RESPONDENT

91. Definitions.

a. "Respondents' Past Response Costs" means those Response Costs paid by Respondents to comply with the Removal AOC before the Effective Date of this Consent Order.

b. "Interest" means interest on the terms and conditions and at the rate set forth in CERCLA section 107(a)(4), 42 U.S.C. § 9607(a)(4).

c. "Respondents' Future Response Costs" means (1) with regard to the Removal AOC, those Response Costs incurred by Respondents to comply with the Removal AOC incurred by Respondents after the Effective Date of this Consent Order, and (2) with regard to this Consent Order, those Response Costs incurred by Respondents to comply with this Consent Order after the Effective Date of the Consent Order.

d. "Removal AOC" means the CERCLA Section 106 Administrative Order by Consent entered into between EPA and Blue Tee on March 22, 2002.

e. "Response Costs" means all necessary costs payable under CERCLA section 107(a), 42 U.S.C. § 9607(a), including but not limited to all of the following categories of costs to the extent they are within the statutory definition and consistent with the National Contingency Plan:

i. The cost of hiring and retaining specialists to conduct technical studies at the Site to develop accurate information on the quantity and quality of hazardous substances, pollutants or contaminants present, the effect of such hazardous substances, pollutants, or contaminants on surrounding areas, and methods of remedial action and the cost of any EPA oversight related thereto;

ii. The cost of employing engineers, scientists,

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

medical or health professionals, financial analysts or planners, and associated personnel to develop fieldwork, undertake studies or assessments, develop plans or specifications, perform cost estimates and associated financial and investment analysis, provide technical, cost, and financial information to EPA, Federal Respondent, or the community, and give advice or perform work in furtherance of the planning or performance of the Work (including, but not limited to, the cost of insurance for liabilities arising from work performed at the Site and work regarding the appropriate health, environmental and design standards to be used, vendor capabilities, and work plans);

iii. The cost of maintenance of records regarding the Site and regarding joint efforts of Respondents and Federal Respondent within the scope of the Consent Order;

iv. The necessary cost of fund management or trust management, and accounting relating to performance of obligations under the Consent Order;

v. The cost of distribution of correspondence, records and notices;

vi. The costs paid by Respondents or Federal Respondent to discharge EPA's claims for past or future response or associated oversight costs and associated interest with regard to the removal action which was the subject of the Removal AOC and the RI/FS which is the subject of this Consent Order (other than EPA's claim for past costs EPA incurred prior to March 22, 2002, for which Respondents have no responsibility);

vii. Any attorneys' fees or fees for paralegals or other legal employees incurred in connection with the negotiation or administration of contracts for the performance of obligations under the Consent Order, and the performance under or administration of the Consent Order;

viii. All other costs incurred by Respondents or Federal Respondent arising in the course of complying with the Consent Order, including the costs of obtaining access and EPA or state oversight; and

ix. The costs of administering and funding any community involvement support and technical assistance plan required by the terms of the Consent Order.

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

"Response Costs" do not include the following:

- i. Attorneys' fees and fees for paralegals, except as provided above;
- ii. Costs connected with publicity or public relations activities, except for costs of the community relations plan and activities required by the Consent Order;
- iii. Costs connected with comments or preparation of responses on public rulemakings or proposed rules;
- iv. The costs of indemnifying EPA pursuant to the Consent Order; and
- v. The cost of any internal review of submittals by Respondents' internal corporate representatives, and Federal Respondent's cost of internal review of submittals; and
- vi. Stipulated penalties assessed against Respondents pursuant to the Consent Order.

f. "Smelter-Related Response Costs" means those Response Costs which are directly or indirectly related to the study of zinc or other metals smelting activities, and activities associated with smelting (such as the production of acid and cadmium production) at the Site.

g. "Non-Smelter-Related Response Costs" means all Response Costs which are not Smelter-Related Response Costs, including but not limited to all response costs identified as Non-Smelter-Related Response Costs in Paragraph 93 below. The costs of the community involvement support and technical assistance plan, described in the Consent Order, are a Non-Smelter-Related Response Cost.

h. "Community Involvement Support and Technical Assistance Plan Costs" means all Response Costs so delineated and described in the Consent Order. Such Response Costs shall be allocated as between Respondents and Federal Respondent as described in Paragraph 98 below.

i. "Work" means the activities to be performed by Respondents pursuant to the Consent Order and the Statement of Work (SOW) attached thereto, and any future activities performed by Respondents pursuant to the Removal AOC.

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

92. Payment of Respondents' Past Response Costs. Federal Respondent will pay to Respondents the sum of \$_____ (22.5 percent of _____) as soon as reasonably practicable after the Effective Date of this Consent Order. If payment is not made within 120 days after the Effective Date of this Consent Order, Interest will accrue on the unpaid balance beginning from the 121st day after the Effective Date until paid. This sum is payment in full and final settlement of Respondents' claim for Past Response Costs.

93. Allocation of Future Response Costs relating to performance of the Consent Order and Removal AOC. Respondents and Federal Respondent agree that for purposes of this Consent Order only, Federal Respondent will pay 22.5 percent of all Smelter-Related Response Costs which are Respondents' Future Response Costs incurred by Respondents in Respondents' performance of the Work, and that Federal Respondent will pay 45 percent of all Non-Smelter-Related Response Costs which are Respondents' Future Response Costs incurred by Respondents in performing the Work. The Parties agree that this allocation is the result of negotiation between them, and that it has no binding or precedential effect whatsoever regarding any allocations except those explicitly set forth herein. Respondents and Federal Respondent also agree that unless otherwise explicitly stated, this allocation is only as between Respondents and Federal Respondent, and does not necessarily reflect either Party's equitable allocation of all Response Costs incurred with regard to performance of the obligations of the Consent Order. Respondents and Federal Respondent agree that all Response Costs incurred for the investigation for organic constituents, for example, volatile organic compounds, semi-volatile organic compounds, PCBs, dioxins, pesticides and herbicides, are presumed to be Non-Smelter-Related Response Costs. (Such Non-Smelter Response-Related Response Costs shall include, but not be limited to, the taking of samples for organic constituents, analysis of such samples, any follow-up sampling, and any engineering or consulting services to the extent directed at organic constituents). If Respondents and Federal Respondent are unable to agree whether a particular item should be considered a Smelter-Related Response Cost or a Non-Smelter-Related Response Cost, they shall utilize the dispute resolution process set forth in Paragraph 95 below.

94. Federal Respondent's Payment of Future Response Costs Incurred by Respondents Regarding the Consent Order and the Removal AOC.

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

a. Initial payment. For purposes of the first funding phase of their agreement pursuant to Section XXVIII of this Consent Order, Respondents and Federal Respondent agree that the current best estimate of the present value of the ultimate total cost of the Work, including EPA's future RI/FS oversight costs, is \$2,500,000, of which \$2,350,000 is allocated to Smelter-Related Response Costs and \$150,000 is allocated to Non-Smelter-Related Response Costs. Federal Respondent's share of the estimated present value of the total cost is therefore \$596,250 (the sum of 22.5 percent of estimated total Smelter-Related Response Costs and 45 percent of estimated total Non-Smelter-Related Response Costs) (Initial Payment). Federal Respondent will pay its Initial Payment as soon as practicable after the Effective Date of the Consent Order. The payment made by Federal Respondent or on its behalf will be made to a trust or account (Fund) in a manner mutually agreed by Respondents and Federal Respondent. If payment is not made within 120 days after EPA's execution of the Consent Order, Interest will accrue on the unpaid balance beginning from the 121st day until paid. Respondents may draw on the Fund as invoices become due, subject to the procedures set forth in Paragraph 94(b) below.

b. Payment of Expenses and Accounting. Respondents will prepare expense reports (Statement of Response Costs) on or before the last business day in June and the last business day in December of each year and provide same to Federal Respondent. The Statement of Response Costs shall identify all Future Response Costs incurred by Respondents since the previous Statement of Response Costs, and shall include (i) a comprehensive description of the Response Costs for which Respondents have drawn or wish to draw on the Fund, including sufficient documentation to allow verification of the accuracy of the claim and consistency of the Response Cost with the Consent Order, (ii) a statement as to whether each Response Cost is a Smelter-Related Response Cost or a Non-Smelter-Related Response Cost, and (iii) certification by an official designated to act for Respondents that the Response Costs included in the Statement of Response Costs are Response Costs within the meaning of this Consent Order and CERCLA, and were incurred or are to be incurred by Respondents. The Statement of Response Costs shall include sufficient detail on the claimed charges to allow for auditing of the Statement of Response Costs consistent with generally accepted accounting principles. Where charges are specified in terms of units or rates, Respondents will specify the units or rates at which charges are being billed.

i. As to the Statement of Response Costs which is due on or before the last business day of December of each year, within 120 days of actual receipt of such Statement of Response Costs by Federal Respondent, Federal Respondent will notify Respondents as to whether Federal Respondent challenges any of the Response Costs set forth in the Statement of Response Costs as not compensable under this Consent Order, or as improperly classified as a Non-Smelter-Related Response Cost. If Federal Respondent challenges some or all of the Response Costs set forth in the Statement of Response Costs, it may initiate the dispute resolution process set forth in Paragraph 95 of this Consent Order. However, the pendency of the dispute resolution process will not prohibit payment of the challenged Response Cost from the Fund.

ii. Federal Respondent shall have the right, within 60 days of the actual receipt of any Statement of Response Costs, to request in writing additional information regarding some or all of the Response Costs contained in the Statement of Response Costs, and Respondents will provide a written response within 45 days of its actual receipt of a written request for additional information from Federal Respondent. As to Federal Respondent's obligation set forth in Paragraph 94(b)(i) above, Federal Respondent's obligation to challenge Response Costs within 120 days of actual receipt of the December Statement of Response Costs, that 120 period shall be tolled for the period of time from Federal Respondent's request for additional information pursuant to this subparagraph 94(b)(ii), to the date of Federal Respondent's actual receipt of Respondents' written response. In the event Federal Respondent rejects some or all of the claimed Response Cost, the Federal Respondent may initiate the dispute resolution process set for in Paragraph 95 of this Consent Order as to the rejected Response Costs. However, the pendency of the dispute resolution process will not prohibit payment of the challenged Response Cost from the Fund.

c. Additional payments of Future Response Costs by Federal Respondent.

i. When the amount of Respondents' Future Response Costs incurred by Respondents in performing the Work reaches 75 percent of the estimated present value of the Work set forth in Paragraph 94(a) above, or when the payments by the Federal Respondent have been exhausted but the Work is not

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

complete, Respondents shall notify the Federal Respondent of that fact in writing. Such notice shall include (a) a projection of the estimated cost of completing the Work; (b) a full explanation of the assumptions and methods used by Respondents in deriving the projection; and (c) a statement demonstrating why the projected additional Response Costs are "Response Costs" within the meaning of this Consent Order and why they are necessary and consistent with the National Contingency Plan. The notice shall also include a breakdown of the projected additional Response Costs into Smelter-Related Response Costs and Non-Smelter-Related Response Costs. Federal Respondent may request additional information regarding the projection in writing within 60 days of its actual receipt of the notice. Respondents agree to provide a response to such request, in writing, within 30 days of their actual receipt of a written request for additional information from Federal Respondent. Within 30 days of actual receipt of the additional information requested, Federal Respondent will notify Respondents which projected Response Costs it accepts and which it rejects. As to those projected Response Costs it accepts, Federal Respondent will pay its allocated share of Response Costs as soon as practicable after Federal Respondent's notification of its acceptance of those Response Costs. The payment made by Federal Respondent or on its behalf will be made to the Fund referenced above in a manner mutually agreed by Respondents and Federal Respondent. If payment of the projected Response Costs is not made within 120 days of the acceptance of the Response Costs by Federal Respondent, Interest will accrue on the unpaid balance commencing from the 121st day until paid. As to those projected Response Costs rejected by Federal Respondent, Respondents may institute the dispute resolution process set forth in Paragraph 95 below with regard to the rejected Response Costs. In addition, Federal Respondent may institute the dispute resolution process set forth in Paragraph 95 below if Federal Respondent alleges that any of the funds expended by Respondents from the initial payment described in Paragraph 94(a) were not in payment of, or reimbursement of Response Costs within the meaning of this Consent Order.

ii. If the cost of completing the Work exceeds the projected additional Response Costs referenced in Paragraph 94(c)(i) above, Respondents may notify Federal Respondent in writing as of the time that 75 percent of the projected additional Response Costs have been incurred by Respondents or when the payments by the Federal Respondent have been exhausted but the Work is not complete. Federal Respondent may request additional information, and Respondents will respond, in the same

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

manner as set forth in Paragraph 94(c)(i) above. If Federal Respondent rejects payment of any of the projected additional Response Costs, Respondents may institute the dispute resolution process set forth in Paragraph 95 below with regard to the rejected Response Costs. In no case will Federal Respondent be required to make additional payments more than twice per year.

In addition, Federal Respondent may institute the dispute resolution process set forth in Paragraph 95 below if Federal Respondent alleges that any of the funds expended by Respondents from the payment described in Paragraph 94(c) were not in payment of or reimbursement of Response Costs within the meaning of this Consent Order.

95. Dispute Resolution. For disputes arising between the Respondents and Federal Respondent regarding those matters set forth in Section XXVIII of this Consent Order, Respondents and Federal Respondent (the Respondent Parties) agree to the following dispute resolution process:

a. The Respondent Parties shall first enter into an informal dispute resolution process in which they attempt to resolve the dispute through informal negotiations. The period for informal negotiations shall be thirty days from the date the dispute arises, unless this period is shortened or extended by written consent of the Respondent Parties. The dispute shall be considered to have arisen when one Respondent Party sends the other Respondent Party a written notice of dispute. The informal negotiation period will commence as of the time the Respondent Party not initiating the dispute has actual receipt of the written notice of dispute.

b. In the event the Respondent Parties are unable to resolve the dispute through the thirty-day informal negotiation period, within fifteen days after the conclusion of the informal negotiation period, either Respondent Party (the "Initiating Party") may institute the formal dispute resolution procedures of this Paragraph by serving on the other Respondent Party (the "Responding Party") a written statement of position on the matter in dispute, including, but not limited to, any factual data, analysis, or opinion supporting its position and any supporting documentation relied upon by the initiating Party. The Responding Party shall serve a responsive statement of position on the matter in dispute upon the Initiating Party within twenty days of actual receipt of the Initiating Party's statement of position. The Initiating Party may serve a reply statement of position on the Responding Party within five days of actual

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

receipt of the Responding Party's statement of position.

c. If the Respondent Parties have been unable to resolve the dispute within fifteen days of the date the last statement of position contemplated in the previous subparagraph is actually received by the Respondent Party to whom it is directed, Respondents may file an action to enforce Federal Respondent's obligations to Respondents under this Consent Order, and all Respondent Parties reserve all rights and defenses.

d. In any dispute resolution process under this section, Respondents and Federal Respondent shall bear their own costs and attorneys' fees.

96. Release and Covenant Not to Sue by Respondents to Federal Respondent. In consideration of the Federal Respondent's execution and performance of this Consent Order, Respondents, their directors, officers, employees, agents, assigns and successors hereby ~~release, discharge, and~~ covenant not to sue the United States based on CERCLA or any other federal law, State law, or common law arising from Respondents' performance of the Work or Respondents' payment of any past or future oversight costs asserted by EPA or any other regulatory agency in connection with the Work and the Removal AOC. This release and covenant not to sue shall be effective as to Respondents' claims for Respondents' Past Response Costs upon payment of those Past Response Costs by the Federal Respondent. As to the release and covenant not to sue for Respondents' Future Response Costs granted herein by Respondents to the Federal Respondent, this release and covenant not to sue shall be effective upon payment of such Future Response Costs by the Federal Respondent. Notwithstanding any other provision in this Consent Order, Respondents reserve the right, after dispute resolution, to sue the Federal Respondent to seek payment of any Respondents' Future Response Costs alleged due and owing under Consent Order not previously paid by the Federal Respondent.

97. Participation by other entities. The Federal Respondent's obligations under this Consent Order only require Federal Respondent to pay 22.5 percent of Respondents' Future Response Costs relating to Smelter-Related Response Costs and 45 percent of Respondents' Future Response Costs relating to Non-Smelter-Related Response Costs, not those percentages of all Smelter-Related Response Costs or Non-Smelter-Related Response Costs. Respondents and Federal Respondent agree that in the event any other potentially responsible party financially

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

contributes to the cost of the Work, Federal Respondent will be credited by Respondents an amount from any future obligations of Federal Respondent regarding the Site in an amount such that Federal Respondent will have only paid a total of 22.5 percent of Respondents' Future Response Costs relating to Smelter-Related Response Costs and 45 percent of Respondents' Future Response Costs relating to Non-Smelter Related Response costs. Respondents' litigation expenses actually incurred in obtaining a judgment or settlement requiring the financial participation in the Work of another potentially responsible party, including reasonable attorney's fees, expert witness fees and other costs that are ordinarily and customarily charged to clients, and which have not been recovered by Respondents from any other source, shall be subtracted from any financial contribution to the Work obtained by Respondents before determining the amount by which Federal Respondent will be credited.

98. Technical Assistance Plan. Federal Respondent will pay the first \$50,000.00 of any cost pursuant to any Community Involvement Support and Technical Assistance Plan ("Plan") required by EPA pursuant to the Consent Order. This payment is in addition to the amounts set forth in Paragraphs 92 and 94 above. Respondents and Federal Respondent shall divide any further payments required of them pursuant to the Plan, Respondents and Federal Respondent each paying fifty percent of such additional payments as between them.

99. Binding Effect of Agreement. The agreement set forth in this Section XXVIII of the Consent Order is binding upon the Respondents and Federal Respondent and their respective successors and assigns, officers, directors, employees and agents. However, this agreement shall not be interpreted to bar or affect the authority of the United States Environmental Protection Agency or any other department, agency or instrumentality of the United States charged with enforcement of environmental laws and regulations from acting within its authority as to Respondents, the Federal Respondent, or the Site.

XXIX. EFFECTIVE DATE AND SUBSEQUENT MODIFICATION

100. The effective date of this Consent Order shall be the date it is signed by EPA.

101. This Consent Order may be amended by mutual agreement of EPA and Respondents and Federal Respondent. Amendments shall be in writing, and project managers do not have the authority to

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

sign amendments to the Consent Order. Based upon objective and validated findings submitted by Respondents during the RI/FS, Respondents may propose new Potentially Responsible Parties to EPA for purposes of amending this Consent Order. EPA shall have final determination as to any new Respondents to be added to the Consent Order.

102. No informal advice, guidance, suggestions, or comments by EPA regarding reports, plans, specifications, schedules, and any other writing submitted by the Respondents will be construed as relieving the Respondents of their obligation to obtain such formal approval as may be required by this Consent Order. Any deliverables, plans, technical memoranda, reports (other than progress reports), specifications, schedules and attachments required by this Consent Order are, upon approval by EPA, incorporated into this Consent Order.

XXX. TERMINATION AND SATISFACTION

103. This Consent Order shall terminate when the Respondents demonstrate in writing and certify to the satisfaction of EPA that all activities required under this Consent Order, including any additional work, payment of past costs, response and oversight costs, and any stipulated penalties demanded by EPA, have been performed and EPA has approved the certification. This notice shall not, however, terminate Respondents' obligation to comply with Sections XX, XXI, and XXII of this Consent Order.

104. The certification shall be signed by a responsible official representing each Respondent. Each representative shall make the following attestation: "I certify that the information contained in or accompanying this certification is true, accurate, and complete." For purposes of this Consent Order, a responsible official is a corporate official who is in charge of a principal business function.

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

Old American Zinc Plant (OAZ) Superfund Site - AOC for RI/FS
Respondents/Federal Respondent Signature Page

BY: _____

Respondents

Title

DATE: _____

BY: _____

Federal Respondent

Title

DATE: _____

Pinkston 2/25/05 redline, incorporating comments from 2/25/05 call with Greenberg, Faye

Old American Zinc Plant (OAZ) Superfund Site - AOC for RI/FS
SF Signature Page

BY: _____ DATE: _____

Richard C. Karl, ~~Acting~~ Director
Superfund Division
U.S. Environmental Protection Agency
Region 5